SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 30 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER, 1970 Term

918

ODIS RUSSELL

versus

GREENVILLE SHIPBUILDING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT G. HEBERT, Esq.
608 American Bank Building
New Orleans, Louisiana 70130

FOUNTAIN D. DAWSON, Esq.
206 Leyser Building
Greenville, Mississippi 38701

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Reasons for Granting Petition	4
Argument	4
Summary	6
Certificate of Service	8
Appendix A	9
Appendix B	11
Appendix C	13
Appendix D	21

LIST OF AUTHORITIES

	Page
Atkins v. Greenville Shipbuilding Corporation, 411 Fed. 2d 279 (Cir. 5, 1969)	2, 3
Bernardo v. Bethlehem Steel, (2 Cir. 1963), 314 F.2d 604	2, 4, 6
Boutel v. Delamore, 379 F.2d 850 (Cir. 5, 1967)	2, 5
Butler v. Whitman, 356 U.W. 271, 2 F.2d 754 (1958)	2, 7
Keller v. U.S. 273 F. Supp. 945 (USDC, New Orleans Division)	2, 5
Offshore Co. v. Robinson, 266 F.2d 769 (Cir. 5, 1959)	2, 4
Producers Drilling Co. v. Gray, 361 F.2d 432 (Cir. 5, 1967)	2, 5, 6
Ross v. Yaka, 373, U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 488 (1963)	3
46 U.S.C.A. § 688	3
U.S. Constitution Art. 3, § 2, Cl. 1	3
Federal Rules of Civil Procedure. F.R.C.P. 9 H.	3

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1970 Term,

ODIS RUSSELL

versus

GREENVILLE SHIPBUILDING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLES, THE CHIEF AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner, Odis Russell, prays that a writ of certiorari issue herein to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, affirming the granting of a summary judgment by the United States District Court for the Northern District of Mississippi.

OPINIONS BELOW

The District Court for the Northern District of Mississippi rendered an opinion which is reprinted as Appendix "A" hereof.

The opinion of the United States Court of Appeals for

the Fifth Circuit, affirming the judgment is reprinted as Appendix "B" hereof.

The opinion of the Fifth Circuit Court of Appeals in: *Atkins v. Greenville Shipbuilding Corporation*, 411 Fed. 2d 279 (Cir. 5, 1969) a case involving almost identical facts and the basis for the Appellate Court's ruling in this case is reprinted as Appendix "C" hereof for this Honorable Court's ready reference.

The testimony of defendant's superintendent, Harry W. Mason, is reproduced as Appendix "D" hereof.

JURISDICTION

Original Federal Jurisdiction in this case predicated upon the Jones Act (46 USCA, 688) and the General Maritime Law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Bernardo v. Bethlehem Steel, (2 Cir. 1963), 314 F.2d 604;

Boatel v. Delamore, 379 F.2d 850 (Cir. 5, 1967)

Butler v. Whitman, 356 U.S. 271; 2 F.2d 754; (1958);

Kellar v. U.S., 273 F. Supp. 945 (USDC, New Orleans Division);

Offshore Co. v. Robinson, 266 F.2d 769, (Cir. 5, 1959);

Producers Drilling Co. v. Gray, 361 F.2d 432 (Cir. 5 1967);

Reed v. Yaka, 373, U.S. 410; 83 S.Ct. 1349, 10 L.Ed. 2d 488 (1963);

46 U.S.C.A. § 688;

U. S. Constitution, Art. 3, § 2, Cl. 1;

Federal Rules of Civil Procedure, F.R.C.P. 9 H.

STATEMENT OF THE CASE

Plaintiff originally commenced suit against the defendant in Admiralty pursuant to F.R.C.P. 9 H. The complaint was later amended to assert a second cause of action under the Jones Act 46 USCA 688.

On and prior to August 30, 1966, plaintiff had been employed as a welder aboard defendant's floating dry dock which was moored on a navigable body of water in Greenville, Mississippi, known as Lake Ferguson.

His original complaint alleged that the dry dock was a vessel and that on August 30, 1966, he was injured as a result of the vessel's unseaworthiness, basing his claim upon the doctrine enunciated by this Court in *Reed v. Yaka*, 373 U.S. 410; 83 S.Ct. 1349, 10 L.Ed. 2d 488 (1963). The amended pleadings alleged that plaintiff was a Jones Act seaman and prayed for a trial by jury. Defendant moved for and was granted a summary judgment. This was affirmed on Appeal, the Fifth Circuit Court of Appeals applying and following its decision in *Atkins v. Greenville Shipbuilding Corporation*, 411 Fed. 2d 279 (Cir. 5, 1969).

REASONS FOR GRANTING THIS PETITION

Since the petitioner is represented by the same counsel that applied for certiorari in the *Atkins* case, we are well aware that this Court refused writs in that litigation. However, we again earnestly appeal to this Court to grant a review here for the sake of resolving an obvious and patent conflict between the decisions in *Atkins*, the case at bar, and the decision of Second Circuit in, *Bernardo v. Bethlehem Steel*, (Cir. 2, 1963). It is further urged that *Atkins* and this case cannot possibly be reconciled with other holdings by the Fifth Circuit hereinafter cited and discussed.

ARGUMENT

The central and only issue in this case is:

CAN IT BE HELD AS A MATTER OF LAW THAT A DRY DOCK IS NOT A VESSEL?

In *Atkins*, the Court of Appeals held "*sub judice*" that it could and petitioner submits that its decision is completely contrary to the rationale of this Court's decisions and indeed, in direct conflict with several prior decisions of that Appellate Court.

In *Offshore Co. v. Robinson*, 266 F.2d 769, (Cir. 5, 1959), an historic and landmark opinion, it was recognized that special purpose vessels and those who man them were subject to the same maritime rules as traditional vessels and crews. Eight years later this same Appellate Court in a forward-looking decision that weighed present day realities in the maritime field held that such special purpose floating objects *as a matter of*

law were vessels; Producers Drilling Co. v. Gray, 361 F.2d 432 (Cir. 5, 1967). This was followed in *Kellar v. U. S.*, 273 F. Supp. 945 (U.S.D.C. New Orleans Division) and *Boatel v. Delamore*, 379 F.2d 850 (Cir. 5, 1967).

In light of the above, it is somewhat surprising that the Court's opinion in *Atkins* and the case at bar harken back to criteria that it rejected over a decade ago, i.e.:

(1) Lack of motive power;

(2) Permanent anchorage;

(3) The fact that the dry dock was not designed or used for navigation or transportation.

Of course, dredges, derrick barges, submersible drilling rigs (and numerous other types of specialized watercraft):

(1) Have not motive power;

(2) Spend months and/or years at a single anchorage;

(3) Are obviously not designed for navigation or the carriage of passengers and cargo.

Respondent's dry dock is admittedly a large, floating object moored in navigable waters. It is fully capable of carrying passengers, cargo and could be moved and used to transport goods and persons to any port in the world should its owner so desire. (See Appendix "D") The law is clear that:

> "The word 'vessel' includes every description of watercraft or other *artificial contrivance used or*

capable of being used, as a means of transportation on water." (Emphasis added.)

Vol. 1, Norris, The Law of Seamen, 2d Ed. Sec. 9.

Respondent has relied heavily upon the argument that petitioner was not "doing a seaman's work and incurring a seaman's hazards." This is reflected in the *Atkins* decision.

Historically, wooden sailing ships, included carpenters and shipwrights as regular crewmen. This was a necessity since in case of vessel damage at sea, on the spot repairs and reconstructions would be essential. But petitioner urges that this is not an issue before this Court. Oil field drillers, tool pushers, roustabouts, and derrick operators are hardly "*doing a seaman's traditional work*" — yet they admittedly are entitled to all maritime remedies if injured aboard a "vessel".

SUMMARY

In conclusion, petitioner respectfully submits that the two opinions of the Fifth Circuit create an arbitrary distinction where no difference exists.

It is patent that these holdings by the Fifth Circuit are in direct conflict with *Bernardo*, supra, which expressly held the exact same issue to be one for the jury. The Appellate Court appears to completely lose sight of the fact that the decisions involving dry docks cited in Atkins *were fact findings, not summary adjudications.* Nor can the result be reconciled with the Fifth Circuit's decision in *Producers' Drilling v. Gray*, supra, except by forging a completely illogical rule to the effect that a

special purpose craft drilling for oil, as a matter of law, is a vessel but one engaged in vessel construction, as matter of law, is not.

We believe this Court's decision in *Butler v. Whitman* 356 U.S. 271; 2 Fed. 2d 754 (1958), constitutes an express ruling by this Court that issues such as here presented are for the jury.

The true rationale of Atkins by the Appellate Court rests in its statement that: (Page 4)

> "*Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, *and its progeny*, *Ryan Stevedoring Co. v. Pan-Atlantic SS Corp.*, 1956 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; *Reed v. The Yaka*, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448; *Jackson v. Lykes Bros. SS Co.*, 1967 386, U.S. 731, 87 S.Ct. 1419, 18 L.Ed. 2d 488, *has resulted in metastasis, if not emasculation of the Act's exclusiveness of remedies provision.*"

The decision disapproves of this Court's extension of the doctrine of seaworthiness and by its conclusions not only seeks to turn back the clock, but in doing so will have created considerable inconsistancy and confusion in this phase of the maritime law should the result remain unchanged by a ruling from this Court.

All of which is

Respectfully submitted,

ROBERT G. HEBERT, Esq.
608 American Bank Building
New Orleans, Louisiana 70130

FOUNTAIN D. DAWSON, Esq.
206 Leyser Building
Greenville, Mississippi 38701

BY:
FOUNTAIN D. DAWSON

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for A Writ of Certiorari were mailed to opposing counsel.

New Orleans, La. , October, 1970.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

GREENVILLE DIVISON

No. GC 6811-S

ODIS RUSSELL,

Plaintiff

versus

GREENVILLE SHIPBUILDING CORPORATION,

Defendant

MEMORANDUM OPINION

The aforesaid cause concerns claims under the Jones Act and under the doctrine of unseaworthiness by an individual who was injured while working on a barge which, at the time, was contained in a floating dry dock. On July 2, 1968, a Motion For Summary Judgment was filed by the defendant, Greenville Shipbuilding Corporation. On February 13, 1969, the Court entered an Opinion and Order overruling the Motion For Summary Judgment.

Since that date, the Fifth Circuit has decided *Louis L. Atkins v. Greenville Shipbuilding Corporation*, GC 6732, Appellate Court, 411 F.2d 279, 5 Cir. 1969. The fact situation of the *Atkins* case is very similar to the case sub judice, even though the *Atkins* case involves only the doctrine of unseaworthiness. Nevertheless, in ruling on the definition of a "vessel", the Fifth Circuit decided the un-

seaworthiness issue of the present case and through dictum decided the Jones Act issue.

The Court decided that as a matter of law, the floating dry dock was not a "vessel". In arriving at this conclusion the Court discussed *Offshore Company v. Robinson*, 266 F.2d 769, 5 Cir. 1959, which is a Jones Act case. The Court stated definitely at 411 F.2d 282, that the "initial determination must be whether the craft or structure upon which the shore based worker was injured is a 'vessel' owing a warranty of seaworthiness".

Since the Fifth Circuit held as a matter of law that the floating dry dock was not a vessel, this Court feels compelled to reconsider the defendant's Motion For Summary Judgment. After careful consideration of the record and the *Atkins* case, the Court is of the opinion that the defendant's Motion For Summary Judgment should be sustained. An appropriate order will be entered.

This the 13th day of January, 1970.

ORMA R. SMITH

UNITED STATES DISTRICT JUDGE

APPENDIX B

ODIS RUSSELL,

Plaintiff-Appellant,

versus

GREENVILLE SHIPBUILDING CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

(July 15, 1970)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: This action by plaintiff Russell against defendant Greenville Shipbuilding Corporation asserts claims under the Jones Act and under the doctrine of unseaworthiness by an individual who was injured while working on a barge which, at the time, was contained in a floating drydock. The district court granted a motion for summary judgment in favor of defendant Greenville Shipbuilding Corporation and plaintiff appeals.[1]

---

[1] Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. *See Murphy v. Houma Well Service*, 5 Cir., 1969, 409 F.2d 804, Part I; and *Huth v. Southern Pacific Company*, 5 Cir., 1969, 417 F.2d 526, Part I.

Plaintiff's counsel recognizes that the facts in the case at hand are identical to those presented by *Atkins v. Greenville Shipbuilding Corporation*, 5 Cir., 1969, 411 F.2d 279, cert. den. 396 U.S. 846, 90 S.Ct. 105, 24 L.Ed. 2d 96, but suggests by this appeal that the courts overrule *Atkins*. This we are not disposed to do.

The granting of the motion for summary judgment by the district court was correct and the judgment is

AFFIRMED.

APPENDIX C

ODIS RUSSELL,

Plaintiff-Appellant,

versus

GREENVILLE SHIPBUILDING CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

(May 12, 1969)

Before THORNBERRY and DYER, Circuit Judges, and FISHER, District Judge.

DYER, Circuit Judge: Atkins, a shore-based welder and fitter employed on Greenville Shipbuilding Corporation's floating dry dock, sustained injuries when a ladder, which he was using to ascend a barge brought onto the dry dock for major repairs, slipped causing his fall to the dry dock's floor. Although he received compensation from Greenville under the Longshoremen's and Harbor Workers' Compensation Act,[1] Atkins, claiming to be a *Reed v. Yaka*[2] seaman not limited exclusively to the remedies of the Act, sued his employer Greenville for breach of the maritime warranty of seaworthiness, alleging that the floating dry dock was a "vessel" and that the ladder was a part of its gear and tackle. Greenville moved for summary judgment on the grounds that no warranty of seaworthiness

---

1 33 U.S.C.A. §§ 901 et seq.
2 *Reed v. The Yaka*, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed. 2d 448

was owed to Atkins because the floating dry dock was not a "vessel" and because Atkins was not doing a seaman's traditional work. The District Court granted the motion upon the latter ground; we affirm on the former.

Greenville Shipbuilding Corporation is engaged in the business of designing, constructing and repairing steel vessels, barges, towboats, floating dry docks and marine vessels at its shipyard on the banks of Lake Ferguson, a navigable waterway near Greenville, Mississippi, on the Mississippi River. As an instrument for the repair of vessels at its Lake Ferguson shipyard, during the years 1961-62 Greenville constructed a floating dry dock which since that time has been floating upon the lake's waters, permanently affixed to the bank of the lake. The dock itself, a large flat surface, is lowered from its floating position within a steel frame by pumping water into watertight compartments. Next the vessel to be repaired is situated above it, after which the dock is raised by pumping air into the compartments. The buoyancy lifts dock and vessel for accessibility to repairmen. The dry dock's position is maintained on the waterfront by cables running to the bank. It is in the exact position in which it was placed upon construction, and it was neither designed for nor used for navigation or transportation. The floating dry dock is without motive power and could only be moved upon water from one place to another by being towed or by other outside power.

On July 26, 1966, the Barge K.C.B. 300 was placed on the dry dock for major repairs to eliminate leaks, requiring among other things removal and replacement

of two sections below her waterline and welding of various cracks. This work could only be done by removing the barge from the water.

Atkins a welder and fitter employed by Greenville, worked on the barge that day. In mid-afternoon he began ascending a ladder leading from the floor, or "dock", of the floating dry dock to the barge. The ladder slipped, and Atkins fell to the floor of the dry dock, sustaining injuries.

As a result of the accident, Atkins made a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, and since filing the claim has received and accepted benefits of approximately three thousand dollars. On June 30, 1967, Atkins filed his complaint alleging injuries sustained due to the unseaworthiness of a "vessel" owned by Greenville, specifically alleging injuries resulting from a defective and unseaworthy ladder which was part of the vessel's gear and tackle. Greenville defended the unseaworthiness claim upon the grounds that Atkins was not doing traditional seamen's work and that the floating dry dock was not a "vessel". The District Court, finding no material facts to be in dispute, held that Atkins was not engaged in work traditionally that of a seaman and entered summary judgment in favor of Greenville.

Atkins is clearly within the compensation provisions of the Longshoremen's Compensation Act,* and Green-

---

*The Act provides that compensation shall be payable "if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any dry dock*) . . . 33 U.S.C.A. § 903(a) (emphasis added). *See Avondale Marine Ways, Inc. v. Henderson*, 1953, 346 U.S. 366, 74 S.Ct. 100, 98 L.Ed. 77; *Travelers Insurance Company v. Shea*, 1967, 382 F.2d 344, 347-48.

ville is equally as clearly an employer under the Act.[4] However, Atkins seeks to avoid the Act's exclusiveness of liability section,[5] which quite explicitly would preclude any further recovery against Greenville, the employer, if the section is given its literal meaning. His technique of avoidance is manipulation of the doctrine of seaworthiness, which as amplified by *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, and its progeny, *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.* 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133; *Reed v. The Yaka*, 1963, 373 U.S. 410, 83 S.Ct. 1349, 10 L.Ed.2d 448; *Jackson v. Lykes Bros. Steamship Co.*, 1967, 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488, has resulted in metastasis, if not emasculation, of the Act's exclusiveness of remedies provision. In *Sieracki* the Supreme Court extended the scope of the maritime warranty of seaworthiness in favor of shore-based employees, including longshoremen, engaged aboard a vessel in work customarily or traditionally performed by seamen, thus allowing longshoremen under the Act to recover against third persons. *Reed* and *Jackson* extended the *Sieracki* extension to allow longshoremen, independently of the Act or its exclusiveness of remedies provision, to recover directly from their employers for injuries resulting from unseaworthiness where the employer is the owner of or has an operational interest in the vessel.

However, regard for the historical development of

---

[4] U.S.C.A. § 902(4) provides that an "employer" under the Act is an employer "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any dry dock*). [Emphasis added.]

[5] 33 U.S.C.A. § 905 provides in pertinent part:

> The liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . at law or in admiralty on account of such injury . . . .

the warranty of seaworthiness and appreciation of the influences upon its development, from *The Osceola*, 1903, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, through *Sieracki*, *Reed* and *Jackson*, reveals that Atkins cannot so easily ensconce himself within the expanded scope of the warranty. With the advent of an increasingly complex and dangerous maritime service it was held that the owners owed to the seaman the duty of furnishing a seaworthy vessel and safe and proper appliances in good order and condition. *The Osceola supra. See The State of Maryland*, 4 Cir. 1936, 85 F.2d 944. In *Sieracki*, by a willingness to recognize substance over form, the warranty was made applicable to those "doing a seaman's work and incurring a seaman's hazards," *Sieracki, supra* at 99, despite " 'the fortuitous circumstance' of their employment by one other than the owner to do the ship's work," or "more modern divisions of labor." *Id.* at 98, 96. Others doing a seationale is the limiting factor of tradition. The limitaed the scope of the warranty, implicit within their raman's traditional work have been included within the warranty. *E.g., Pop & Talbot, Inc. v. Hawn*, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143. In addition to expanding the class of persons covered by the warranty, due to the emergence of special purpose craft, the vessels owing the warranty in recent years also have become more diverse; again through recognition of substance over form. *See Offshore Company v. Robison*, 5 Cir. 1959, 266 F.2d 769.

But despite expansions of the warranty because of the technical progress of the modern maritime service, tradition plays an important role. While the *Sieracki*, *Reed* and *Jackson* decisions in one sense expand-

tion requires that the injured shore-based worker be engaged in work traditionally that of a seaman, *United N.Y. and N.J. Pilots Association v. Halecki*, 1959, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed.2d 541, excluding those persons performing such tasks as making major repairs requiring dry docking or special skills. *See West v. United States*, 1959, 361 U.S. 118, 80 S.Ct. 189, 4 L.Ed.2d 161; *Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Service*, 5 Cir. 1967, 377 F.2d 511, *Union Carbide Corporation v. Goett*, 4 Cir. 1958, 256 F.2d 449; *Berge v. National Bulk Carriers Corporation*, 2 Cir. 1958, 251 F.2d 717; *Berryhill v. Pacific Far East Line*, 9 Cir. 1956, 238 F.2d 385. By the same token, the craft or structure said to owe a warranty of seaworthiness must fall within the traditional category of "vessels". *Cf. Offshore Company v. Robison*, *supra* at 781.

Concentrating upon Atkins' duties in making major repairs to the barge placed on the dry dock, the District Court held that Atkins was not engaged in work traditionally that of a seaman, hence denying recovery because he was outside the class of persons within the warranty's coverage. In doing so the District Court deemed it unnecessary to decide whether the floating dry dock was a "vessel" owing a warranty of seaworthiness. We disagree with that approach.

In view of this Court's decision in *Offshore Company v. Robison*, *supra*, the initial determination must be whether the craft or structure upon which the shore-based worker was injured is a "vessel" owing a warranty of seaworthiness. Only following a determination that the craft or structure is a "vessel" does it become necessary to decide whether the worker's duties

were those traditionally performed by seamen, *Halecki, supra*, or in the case of unconventional specialty craft, duties contributing to the accomplishment of the vessel's mission, *Offshore Company v. Robison, supra*, in which case the warranty of the vessel's seaworthiness would be owing to the plaintiff.

Although the District Court made no determination whether the floating dry dock *sub judice* was a "vessel" owing a warranty of seaworthiness, since no material facts are in dispute as to the nature, purpose or character of the structure this Court may make that determination. The appellant contests only the ultimate fact whether a floating dry dock is a special purpose vessel owing a warranty of seaworthiness, not whether the floating dry dock was in fact a floating dry dock, and contends that the ultimate determination can only be made by a jury. We disagree and hold as a matter of law that the floating dry dock *sub judice* was not a "vessel" owing a warranty of seaworthiness.

Since *Cope v. Vallette Dry Dock Company*, 1887, 119 U.S. 625, 7 S.Ct. 417, 30 L.Ed. 501, if not before, *Snyder v. A Floating Dry Dock, D.N.J.* 1884, 22 F. 685, it has been clear that a floating dry dock is not a "vessel". *Cope v. Vallette Dry Dock Company, supra*, held that a floating dry dock was not a "vessel" for purposes of salvage. The same considerations are applicable to whether a warranty of seaworthiness is owed. "A fixed structure such as this dry dock is, not used for the purpose of navigation, is not a subject of salvage service, any more than is a wharf or a warehouse when projecting into or upon the water." *Cope, supra* at 627. Mere flotation on water does not constitute a structure a

"vessel" for purposes of salvage nor warranty of seaworthiness. The element of risk and exposure to the hazards of the sea, necessary for the operation of and common to both principles, is absent upon floating dry docks. *Compare Cope v. Vallette Dry Dock Co., supra* at 627-29, *with Seas Shipping Co. v. Sieracki, supra* at 93-95, 99. While ordinarily "attempts to fix unvarying meanings [that] have a firm legal significance to such terms as 'seaman', 'vessel', 'member of a crew' must come to grief on the facts" *Offshore Company v. Robison, supra* at 779, no particular difficulties are here presented.

We find nothing in *Producers Drilling Company v. Gray*, 5 Cir. 1967, 361 F.2d 432, or *Bernardo v. Bethlehem Steel Company*, 2 Cir. 1963, 314 F.2d 604, which requires departure from the settled rule that a floating dry dock is not a vessel. The former dealt with a barge, which it is well settled may be a vessel, *Producers Drilling, supra* at 435, and in *Bernardo* the Court was not called upon to make the determination we here make. *Supra* at 608.

AFFIRMED.

APPENDIX D

Q. Now, referring to the dry dock, you can move this from place to place, can you not, by the use of tugs?

A. By using outside power.

Q. It could be moved from one mooring to another mooring?

A. Right.

Q. And, in the course of moving it from one mooring to another mooring, of course it would be possible to move with it anything that happened to be aboard? In other words, if you had workmen aboard it, if you had vessels aboard it, or if you had anything else aboard it, they could be moved right along with the dry dock from one place to another, if you (30) wanted to?

A. If you had enough power, yes.

Q. If you had the power. Wouldn't it also be possible, if you wished to do so, to construct living quarters above the dry dock, if you wanted to have them there — ignoring whether it is customary to do it or not, if you wished to construct it?

A. It wouldn't be practical, because it would cut down on your work space.

Q. Conceding that, Mr. Mason, if you did wish for any particular reason to have living quarters aboard it, you could construct it, couldn't you?

A. You could build it, if you wanted to put it on there, yes, but it would, like I say, cut down on your work space.

Q. It wouldn't operate as efficiently as it operates the way you have it drawn?

A. That's right.

Q. And this dry dock, of course, is used exclusively for the repair and for working on vessels?

A. That's right.